No. 86-881 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO OPPOSITION

RUSSELL N. LUPLOW*
DIANA L.S. PETERS
505 Woodward Avenue
Bloomfield Hills, MI 48013
(313) 644-8666
Attorneys for Petitioners
**Counsel of Record*

THE AMERICAN PRINTING COMPANY
615 SECOND AVENUE, DETROIT, MICHIGAN 48226 — (313) 963-9310

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QUESTION PRESENTED

When bringing a collection action under ERISA and the LMRA, are the trustees of a multiemployer pension fund bound by a secret agreement between a union and an employer which the fund has had no opportunity to reject, which attempts to reduce the employer's contribution obligations under its collective bargaining agreements, and which, by omitting contributions for three years on covered employees, is inconsistent with ERISA's minimum criteria for participation, vesting, and benefit accrual and therefore creates unfunded liabilities chargeable against the plan?

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INTRODUCTION

In an effort to persuade this Court that Central States' Petition is not worthy of discretionary review, Kraftco argues that no public policy concerns of significance have been raised; the Pension Fund has suffered no more than speculative harm and therefore seeks merely an "advisory opinion" and "prospective" relief; even if the Pension Fund has suffered harm, the "historical" context in which this "episodic" litigation arose makes "recurrence" of such harm unlikely; the Sixth Circuit's opinion is consistent with federal labor law and pension policy in that it gives full recognition to the "doctrine of exclusive representation" as well as to the fact that trustees' rights are "derivative of," "limited by," "subordinate" and "subservient" to the "intent" of parties to collective bargaining agreements; the Sixth Circuit's decision is therefore consistent with such decisions of this Court as *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); and *Central States, et al. v. Central Transport*, 472 U.S. 559 (1985), which purportedly place primacy on the collective bargaining agreement with regard to an employer's rights and obligations to a pension fund. In addition, Kraftco alleges that the Pension Fund's "Question Presented" has misstated the facts and that the Fund has violated the "law of the case" doctrine, thereby "reopening" issues already decided.

This Reply will address these contentions, in particular those arguments that Kraftco raises for the first time in its opposition.

ARGUMENT

1. Significant Public Policy Considerations of Widespread Applicability are at Stake in This Appeal

ERISA, as interpreted by DOL Regulations, advisory opinions, and decisions of this Court, makes clear that fund trustees have statutory obligations that are both independent of the collective bargaining process and absolute. The central issue for review in this appeal is therefore whether, given such absolute statutory liability, fund trustees should be bound by a side agreement which, although intended to endure "in perpetuity," is inconsistent with the written terms of at least nine successive collective bargaining agreements, is inconsistent with ERISA's minimum standards for participation, vesting and benefit accrual, which reduces an employer's contribution obligations by permitting contributions for covered employees to be withheld until the completion of 36 months of service, which therefore creates unfunded liability chargeable to the plan — attributable to these three years of omitted contributions — without the knowledge and consent of the Pension Fund Trustees, and which, as determined by the District Court based on evidence adduced at trial, was not disclosed even to the bargaining units affected.

The question presented can be divided into two principal subissues, both of which raise important considerations of law and policy that will affect the financial integrity of all Taft-Hartley employee benefit funds because they touch upon the boundary line or, at least, a potential conflict between collective bargaining and trust administration. More concretely, these issues present the question whether in view of the absolute liability of trustees to credit service and provide benefits — regardless of employer contributions — in accordance with statutorily-defined minimum criteria (and/or a particular plan), there are certain limits upon the freedom of employers and unions to elect to participate in ERISA plans through the collective bargaining process and at the same time to repudiate resulting funding obligations through the vehicle of an undisclosed collateral agreement.

In response to Kraftco's principal objections, these issues can be framed as follows: is a side agreement entitled to enforcement as part of the "living contract" between the employer and the union

on the sole grounds that the agreement was ratified even though the agreement was not disclosed to the Pension Fund, is inconsistent with the participation standards of ERISA (as well as with those of the Central States Pension Plan) and imposes unfunded liabilities on the Fund that could have been avoided had the parties' "intent" been incorporated in a collective bargaining agreement that was submitted to the Fund in the ordinary course of business?[1] In other words, does the doctrine of "exclusive representation" — as characterized by Kraftco — override all other considerations so that any pension agreement properly "formed" (i.e. negotiated by authorized representatives and ratified) becomes binding on trustees in an ERISA collection action regardless of its secrecy (vis-a-vis the trustees) and regardless of its deviation from ERISA or the requirements of a fund?

Second, is a side agreement of the type at bar entitled to enforcement as an executed "bargain" even if it was not disclosed to the bargaining unit, was not ratified, and was not disclosed to the Pension Fund solely on the grounds that the union official who executed it had apparent authority to enter into binding agreements concerning the terms and conditions of employment? In other

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[1] Respondent does not assert that the Pension Fund did not receive copies of the post-1969 collective bargaining agreements which deleted reference to Kraftco's 1966 "practice" of withholding contributions for 36 months. There is no testimony at trial, no discovery, and no affidavit to this effect. Indeed, Kraftco suggests the converse at page 10 of its Brief. Nevertheless, although the record is silent and this point is not an issue in this appeal, counsel did search the Fund's records in connection with the preparation of the Petition and found that, in fact, copies of successive collective bargaining agreements from 1969 through 1978 existed in Kraftco's file. Although the District Court appears to have made a finding of fact that the Fund did not have copies of these collective bargaining agreements (Pet. App. 11a), the context in which this reference appears suggests that the court was referring to the "side agreement" about which there was undisputed testimony that it was not disclosed to the Pension Fund. Since the District Court found in favor of the Fund on the grounds that the Trustees had the right to rely on collective bargaining agreements whose terms could not be eroded by secret side agreements (Pet. App. 25a-26a), no other interpretation of this finding seems reasonable. However, even if the Fund did not receive or was not aware of the 1969-1978 collective bargaining agreements prior to the commencement of litigation, it is these documents which would ultimately validate Kraftco's contributions under 302(c)(5) of the LMRA and which would provide the basis both of an employee's claim and the Fund's liabilities, as Mr. Yarbrough's affidavit indicates (Pet. App. 112a). In other words, the *existence* of the collective bargaining agreements, the time when they were *formed*, and the *language contained* in the pension provision of these contracts are alone dispositive in assessing whether the "side agreement" constituted a valid modification. Whether or when the Fund received the collective bargaining agreements might be pertinent, at most, to an estoppel defense which is not the subject of this appeal.

words, does "apparent authority" override even the doctrine of exclusive representation not to mention the strong federal interest in promoting the financial soundness of employee benefit funds and protecting the rights of fund participants and beneficiaries (including those of the employer who entered into the "side agreement")?

The District Court and the Court of Appeals disagreed as to whether the side agreement was ratified. This is, of course, a factual matter that may be regarded as "episodic" in nature, as Kraftco contends. What is *not* "episodic" is the courts' differing views of the *consequences* of a failure to ratify. Of particularly great concern to the Pension Fund is the Court of Appeals' view that the side agreement was enforceable even without ratification because of the union official's apparent authority. If this rationale is left to stand, there is no limit to the variety of deviant practices that can be implemented since "apparent authority" has actually been elevated above the principle of "exclusive representation" and thus the right of employees to participate in the formation of collective bargaining agreements through the universally-accepted practice of ratification. With regard specifically to the Pension Fund, the Court of Appeals' ruling has made the Trustees' rights under ERISA subordinate *not merely* to the labor law doctrine of exclusive representation but to far less relevant common law principles of agency. This is particularly inappropriate considering the well-established fact that unions and employee benefit funds may not and do not themselves exist in an agency relationship but, as a matter of law, are entirely separate entities.

Kraftco has not disputed that two types of agreements existed, one of which was *never* disclosed to the Pension Fund although it purported to "clarify" the term "regular" employee as this term was used in numerous successive collective bargaining agreements between 1969 and 1978. Hence, Kraftco's opposition bypasses Central States' principal concern that employers will enter into collective bargaining agreements as a facade while concealing their true "intent" in a side agreement that is never disclosed to the Fund and, quite possibly, not even to the bargaining unit affected.

The notion that *any* agreement by an employer and a union is entitled to enforcement (whether because it has been ratified or because a union official may be cloaked with apparent authority) has no merit in the context of ERISA and is not a position that can be advanced in reliance either on the statute or decisions of this Court.

All employers' collective bargaining agreements are incorporated by reference in the Central States Trust Agreements (as noted in *Schneider, supra*). They therefore become part of what ERISA terms a "plan document." Under 29 U.S.C. § 1104(a)(1)(D), trustees are required to administer funds in accordance with "plan documents" *unless* the document is inconsistent with ERISA. Since Kraftco's side agreement (even if regarded as part of the "living contract") is inconsistent with ERISA's minimum standards for participation, vesting and benefit accrual and is *also* inconsistent with the Central States Pension Plan (Pet., p. 12), the trustees would not be free to "administer the plan" in accordance with the side agreement: this means that the Trustees could *not* defend a claim for credited service and for benefits on the grounds that an employee was not "covered" until he or she had completed 36 months of service. Indeed, the Yarbrough Affidavit (Pet. App. 109a-114a) reveals the Fund's awareness that the Trustees could not, consistent with ERISA and the Pension Plan, deny credits and benefits in reliance on the side agreement. If the Fund and its Trustees cannot rely on the side agreement in denying service credits and benefits, Kraftco should not be permitted to rely on the side agreement in refusing to fund these credits and benefits.

Kraftco's emphasis on the doctrine of "exclusive representation" and the primacy of the collective bargaining agreement oversimplifies the issue. While *Amax, Schneider* and *Central Transport* are clear that an employer's contribution obligations are limited to the terms of a negotiated collective bargaining agreement, these cases do *not* stand for the proposition that trustees must accept and are bound by undisclosed collateral agreements that do not conform to a pension plan's participation requirements tailored to conform with ERISA's mandates. The present state of the law is that if a nonconforming contract is disclosed to the trustees, the appropriate remedy is to reject the contract together with contributions made thereunder. (Pet., p. 24). Where, as here, it is only an undisclosed side agreement that fails to conform, an appropriate remedy is to disregard the side agreement and enforce the collective bargaining agreement, as the District Court found.

In sum, there is no merit to Kraftco's contention that the issues at bar are "academic," "episodic," unimportant, and not likely to recur. Rather, the Petition raises very serious questions of law and policy concerning the freedom of parties to elect to participate in multiemployer pension plans through the collective bargaining pro-

cess while at the same time repudiating resulting funding obligations through undisclosed side agreements. If side agreements like Kraftco's are enforced in accordance with the Sixth Circuit's reliance on principles of contract formation (ratification) and apparent authority (agency), the integrity of collective bargaining agreements as the true measure of an employer's obligations and a fund's rights and liabilities will be subject to great uncertainty. Likewise, the substantial protections afforded plan participants in *Schneider* and *Central Transport* will be seriously diluted.

2. PETITIONER DOES NOT SEEK AN "ADVISORY OPINION" TO REMEDY "SPECULATIVE HARM"

Kraftco argues that the "side agreement" prevented the Fund from suffering "harm in fact" because the agreement "explicitly" required the company to "make whole" any employee whose "pension entitlement was affected by the deferral agreement." (R.B,. pp. 5-6, 11). Respondent also suggests that absent proof of actuarial harm resulting from the Fund's mistaken belief as to Kraftco's obligations under its collective bargaining agreements from 1969-1978, the Fund's "actuarial integrity" has not been diminished by the side agreement (*id.* at 11). In a word, Kraftco attempts to persuade this Court that the Fund seeks to remedy a phantom injury.

As a preliminary matter, it should be recalled that Kraftco's "make whole" agreement was not needed to make Kraftco's *employees* whole. The Pension Fund was required by *law* to grant benefits to eligible employees independent of the Fund's receipt of Kraftco's "past due" contributions. The issue is therefore whether the "side agreement" made the *Pension Fund* whole. It did not. First, the "make whole" agreement covered only those of Kraftco's employees who became eligible for contributions while still in Kraftco's employ. Kraftco admits that turnover was high in the bargaining units affected by the 36-month deferral practice. (R.B., pp. 2, 12). The inference to be drawn from this admission is that a majority of these employees will have or will become eligible for a retirement benefit, if at all, then while in the employ of a subsequent employer who will not be contractually obligated to fund the initial years of contributions omitted by Kraftco. Second, Kraftco's collective bargaining agreements required contributions on *all* covered employees upon completion of their probationary period (i.e. after 30 or 90 days). The Pension Fund had a right to receive these contributions immediately and without regard to these employees'

ultimate ability to sustain a claim for a retirement benefit. Kraftco's argument, like that of the Court of Appeals, ignores the basic premises of a pooled multiemployer trust fund. In short, Kraftco has not demonstrated how its "make whole" agreement "explicitly" protected the Pension Fund from "actual harm."

Moreover, proof of actuarial harm was not needed in order to establish harm-in-fact. By deferring contributions, and hence participant status, for three years, Kraftco's side agreement on its face failed to conform with ERISA's minimum participation requirements (and *a fortiori* those of the Central States Plan which are more generous). Thus, the agreement *per se* created "unfunded liabilities chargeable against the plan." The legislative history of MPPAA indicates that Congress was disturbed by the cost of collection and intended that collection actions be streamlined and expeditious. 126 Cong. Rec. (H) 23039 (1980). Given a patently nonconforming agreement, the Pension Fund was not required to expend fund assets making needless proofs regarding actuarial harm. Hence, its failure to do so does not render Central States' Petition a request for an "advisory opinion" to remedy "speculative harm."

3. PETITIONER HAS NOT MISSTATED THE FACTS IN ITS "QUESTION PRESENTED" THEREBY "DEPRIVING THE PETITION OF MERIT"

Kraftco's basic contention is that the side agreement was "open," "well-known," and consistent with the employer's contribution "practice" under its 1966 collective bargaining agreement. Kraftco thus objects to Central States' characterization of the side letter as a "secret agreement" that "reduced the employer's contribution obligations under its collective bargaining agreements" and "omitted contributions for covered employees." (R.B., p. 13).

Petitioner seeks affirmance of the District Court's judgment; quite properly, therefore, Central States has adopted the characterization given the "side agreement" by the District Court. In concluding that the "side agreement" was a secret understanding, the District Court relied upon the following *facts*: 1) the 1966 collective bargaining agreement expressly and for the first time permitted Kraftco to withhold contributions for 36 months; 2) during negotiations for the 1969 milk plant contract, an IBT representative unequivocally informed the employer and the union that a three-year deferral period was unacceptable and had to be deleted from the collective bargaining agreement; 3) accordingly, the parties modified

the 1966 pension provision so that the new contract required contributions on all "regular" employees (meaning those who had completed their probationary period as set forth in Article I of the same contract); 4) Don Vestal (President of Local 327) met with Kraftco's negotiators (Spencer and Rose) *after* the offending language was deleted from the collective bargaining agreement in order to find a way to perpetuate the company's prior "contribution practice" notwithstanding the language of the new contract; 5) no member of the union bargaining committee was present when the "side agreement" was executed; 6) the parties' "intent" to adhere to the 1966 "contribution practice" was not communicated to the milk plant bargaining unit in 1969 or to any bargaining unit subsequently; 7) the "side agreement" was not disclosed to the new union leadership after Don Vestal was ousted from office for corruption and financial malpractice in 1971 and hence was not raised during negotiations of any collective bargaining agreements after 1969; 8) the "side letter" was not disclosed to the Pension Fund; 9) the union did not become aware of its existence until 1978 when a member of the milk plant bargaining unit (which had supposedly ratified the "side agreement" in 1969) inquired about his pension status and learned from Central States that no contributions had been made for the first three years of his employment; and 10) in 1978, Kraftco immediately began to remit contributions after 30 or 90 days, *in accordance with the terms of the collective bargaining agreement*, although its defense of the "side agreement" was premised upon the collective bargaining agreement's "ambiguity."

Given this "overwhelming evidence" both of a direct and circumstantial nature, a panel of the Court of Appeals affirmed the District Court's decision. As indicated in the Petition, the *en banc* Court's *de novo* treatment of the District Court's factual findings and its departure from the standards set forth in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), constitute an abuse of appellate discretion to review the findings of the trier of fact. On this basis alone, the judgment should be vacated. There is no basis for Kraftco to argue that the Pension Fund has "misstated" the facts.

Nevertheless, Kraftco contends that the Fund was never given an "opportunity" to believe that the company's "contribution practice" was anything other than that set forth in the 1966 collective bargaining agreement and "detailed" in the "side agreement" of 1969. Kraftco states, further, that Central States' failure to challenge the 1966 collective bargaining agreement together with the

Fund's subsequent "inaction" from 1969 to 1978 caused Kraftco to believe that its "unabated" 36-month deferral "practice" was satisfactory. (R.B., pp. 10-11). Finally, Kraftco argues that since the "side agreement" merely perpetuated prior "practice," it did not constitute a "modification" of the 1969 collective bargaining agreements and hence did not require disclosure to the bargaining unit. (R.B., p. 3). These arguments are flawed because Kraftco confuses its "contribution practice" with its contractual "contribution obligations."

First, it must be emphasized that Kraftco did not establish that the 1966 collective bargaining agreement was unsatisfactory and this contract has never been an issue in the litigation. Thus, the Fund's alleged failure to reject the 1966 collective bargaining agreement has no relevance as a point of departure for Kraftco's estoppel-like argument. Second, Kraftco does not contend that the Pension Fund never received copies of the 1969 collective bargaining agreements and those executed thereafter. These contracts clearly modified the terms of the 1966 collective bargaining agreement. Third, the facts have conclusively established that the "side letter" was not disclosed to the Pension Fund. Hence, Central States had every reason to believe that contributions were required after 30 or 90 days and not as set forth in the 1966 contract. In essence, Kraftco's contention is tantamount to faulting the Pension Fund for failing to object to something which was deliberately concealed from its view.

In sum, Kraftco has not shown that its "contribution practice" was open, well-known and consistent with its "contribution obligations" under operative collective bargaining agreements. Most important, by focusing on the continuity of its "contribution practice," Kraftco appears to have admitted that the change of language in the 1969 collective bargaining agreement together with the "side letter" nullifying that change were *not disclosed to the bargaining unit*, as the District Court found (R.B., p. 3).

4. PETITIONER HAS NOT TRESPASSED AGAINST THE "LAW OF THE CASE"

Kraftco states that the Court of Appeals, in an earlier decision, established the law of the case: namely, that "the collective bargaining agreements of 1969 could not be interpreted solely by resort to the language contained within them" (R.B., p. 24). It thus argues that the Fund "cannot now reopen the fundamental questions con-

cerning contractual ambiguity and resort to extra contract evidence" (R.B., p. 25).

The Pension Fund's principal contention in its present request for review is that the "side letter agreement" did not effectively modify the operative collective bargaining agreements so as to permit Kraftco to withhold contributions for 36 months. Prior to its 1986 decisions, the Sixth Circuit made *no* substantive ruling on this issue. In the earlier appeal referred by Respondent, the Sixth Circuit merely held that the District Court improperly dismissed Kraftco's action against the union because it erroneously treated the company's separate action as a motion for joinder in the Pension Fund's suit. *See Kraft, Inc. v. Local Union 327*, 683 F.2d 131, 133 (6th Cir. 1982). The "law of the case" has no relevance whatever to the merits of Central States' Petition.

CONCLUSION

For the reasons stated in its Petition and in this Reply, Central States respectfully requests this Court to grant its Petition so that some degree of certainty will prevail concerning the ability of undisclosed side agreements to affect the terms of duly executed collective bargaining agreements upon which employees' rights and trustees' obligations are predicated.

Respectfully submitted,
Russell N. Luplow
Diana L.S. Peters
Russell N. Luplow, P.C.
505 Woodward, Suite 3400
Bloomfield Hills, MI 48013
(313) 644-8666
Attorneys for Petitioners